No. 15408

United States Court of Appeals
For the Ninth Circuit

GRACE & CO. (Pacific Coast), a corporation, *Appellant,*

vs.

PITTSBURGH TESTING LABORATORY, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG
United States District Judge

APPELLEE'S BRIEF

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JURISDICTION

This is a civil action in contract for damages in excess of $3,000, exclusive of interest and costs, which was filed in the United States District Court for the Western District of Washington June 8, 1954 (R. 9) by appellant, Grace & Co. (Pacific Coast),a West Virginia corporation, against appellee, Pittsburgh Testing Laboratory, a Pennsylvania corporation (Complaint R. 3-9; Pre-Trial Order R. 18-19). The nature of the action, diversity of citizenship and the amount in controversy gives the District Court jurisdiction by virtue of Title 28, U.S.C. Sec. 1332. Following trial of the case and on September 21, 1956, judgment was entered (R. 105) from which an appeal was taken on October 18, 1956 (R. 105, 106), and duly filed in this court on Janu-

ary 11, 1957 (R. 546). This court has jurisdiction of the appeal by virtue of Title 28, U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The appellant, Grace & Co., brought suit against the appellee, Pittsburgh Testing Laboratory, to recover claimed damages in the sum of $21,747.24 for an alleged breach of contract between the parties wherein the appellee agreed to inspect certain steel billets ordered by the appellant from the Seattle Foundry Co., Inc.

The appellant was and is engaged in the operation of a large export and import business and maintains offices throughout the United States, including, among others, Washington, D.C., San Francisco, California and Seattle, Washington (R. 82). The appellant's Seattle office, in response to a request from appellant's San Francisco office, mailed letters on April 23, 1952, to various companies in Seattle requesting offers on steel billets, specifications ASTM A-17/29 (R. 235, Ex. 3). The letters of inquiry were sent out in an effort to fill a proposed order for steel billets ASTM A-17/29 from the New Zealand Government Trade Commissioner (R. 118, Ex. 1). In late April or early May, 1952, Mr. William H. Schlauch (whose name is improperly spelled "Schlaugh" in the Record) of appellant's Seattle office had telephone conversations with several of the prospective suppliers, including one with Seattle Foundry Co., Inc., hereinafter referred to as "Seattle Foundry," in which Schlauch was advised that Seattle Foundry could furnish sand cast billets (R. 274, 275, Ex. 54 p. 55). On April 30th, Mr. Schlauch was advised by Sei-

delhuber Steel Rolling Mill Corporation, one of the suppliers to whom appellant had made inquiry, that Seidelhuber could only furnish "forging quality ingots" which would have the quality of steel billets; Seidelhuber further inquired of Mr. Schlauch whether quality forging ingots would be satisfactory (R. 270, Ex. 5, A-4). Mr. Schlauch, on May 1st, advised Mr. C. G. Gips, who was handling the transaction for appellant's San Francisco office, that Isaacson Iron Works had submitted a written proposal to supply steel billets to meet specifications ASTM A-17/29 (Ex. 5 and 6). Pacific Car & Foundry Company notified Mr. Schlauch on May 2nd that the particular ASTM specification was obsolete and the subject of "rolled or cast ingots" was discussed (R. 272, 273, Ex. 54 p. 55). After the receipt of a quotation on the order from Seattle Foundry (Ex. 7), Mr. Schlauch, on May 5th, had a telephone conversation with Mr. James Murphy, the manager of Seattle Foundry, in which Murphy advised Schlauch that the billets which Foundry would supply to meet the order were "cast steel billets from sand molds" (R. 276, 277). During this conversation, Schlauch made a pencilled notation on Seattle Foundry's letter to appellant dated May 2, 1952, as follows: "Cast steel from sand molds" (R. 279, Ex. 7). This notation is still legible on Exhibit 7, even though Mr. Schlauch attempted to erase it after the New Zealand Government made a claim against appellant (R. 280, 282, 283).

Upon receipt of Isaacson Iron Works' written proposal, Mr. Gips, on May 6th, advised appellant's Washington, D.C., office that Isaacson had offered to supply the billets (Ex. 8). Thereafter, appellant executed a

purchase order with the New Zealand Government Trade Commissioner based on the prices quoted by Isaacson (R. 120, Ex. 11).

On May 8, 1952, Schlauch wrote Gips that Seattle Foundry had offered to supply the billets at a much lower price per ton than Isaacson Iron Works and stated "These billets are cast steel from sand molds . . . " (Ex. 9, Appendix 39). Upon receiving this information, Mr. Gips wrote and teletyped Schlauch and expressed great concern over the substantial difference in price between the quotations of Isaacson and Seattle Foundry and instructed Schlauch to recheck all "figures, specifications and grades" (Ex. 10, 12). Thereafter, on May 12th Mr. Schlauch called Mr. Murphy at Seattle Foundry and was advised that Seattle Foundry had made an error in its price quotation on Item 2 and, accordingly Foundry *reduced* its offer to supply Item 2 from $175.00 per ton to $130.00 per ton (R. 241). In this conversation, Mr. Murphy discussed the chemical requirements of ASTM A-17/29 specifications with Mr. Schlauch in some detail (R. 240, 241, Ex. 54 p. 58). Later in the day on May 12th, Mr. Schlauch called Isaacson Iron Works, who informed him that the billets produced by Isaacson would be "roll(ed) to size" (R. 288, Ex. 54 p. 59). In this conversation Schlauch made no attempt to ascertain from Isaacson why there should be such a large differential in the prices quoted by Isaacson and those quoted by Seattle Foundry (R. 288). Indeed, neither Gips nor Schlauch made any attempt to account for the great price discrepancy (R. 196, 199, 207).

Upon being assured by Schlauch that Seattle

Foundry's price had been rechecked (Ex. 13), Mr. Gips, on May 15th, called Schlauch and instructed him to accept Seattle Foundry's offer to manufacture the billets (R. 142, 291). Mr. Schlauch, thereupon, on May 15th, orally ordered the billets from Seattle Foundry (R. 291, 292). Thereafter, on May 16th, appellant's Seattle office sent a letter to Seattle Foundry which purported to be a written contract to supply the billets (Ex. 20). In spite of the fact that specifications ASTM A-17/29 called for the billets to be of rolled or forged steel rather than simply cast steel (R. 25), Seattle Foundry wrote appellant on May 16th stating in part, "It is our intention to pour these billets in sand molds . . . " (Ex. 23, Appendix 40). The reference to "pour in sand molds" obviously meant that the Seattle Foundry, which had no facilities for rolling or forging steel, intended from the outset to supply cast steel billets (R. 484). This fact was accepted by appellant who answered Seattle Foundry's letter of May 23rd advising Seattle Foundry, "we have no objection to your pouring both sides flat" (Ex. 26).

Appellant placed its order for the billets with Seattle Foundry rather than Isaacson Iron Works because Seattle Foundry's prices were considerably lower than Isaacson's quotations (R. 132, 133, 190, 195). Appellant paid Seattle Foundry $27,119.16 for the billets (R. 99). Isaacson's price, based on its quotations to appellant, would have been $36,310.00 (R. 337, 338). In fact, Seattle Foundry's price would have meant at least $6,000 to $8,000 additional profit to appellant since their agreement with the New Zealand government was based upon Isaacson's quotations (R. 191, 192). Ap-

pellant was well aware of the danger in placing the business with an unknown supplier such as Seattle Foundry where there was such an unusually large price differential. Long before the billets were finally shipped the appellant's San Francisco office cautioned appellant's Seattle office about the unusual price spread (Ex. A-15). After the difficulty arose, Mr. George Mahoney, appellant's vice-president in charge of its San Francisco office, reminded the Seattle office of the fact that the "bargain purchase that your office has made has boomeranged . . ." (Ex. A-12). At the same time, however, the appellant's Seattle office was vitally interested in receiving credit for the unusual profit resulting from placing the order with Seattle Foundry (R. 298, Ex. 24, Appendix 41).

Although Mr. Gips had made a preliminary telephone inquiry as to whether appellee had facilities to inspect the billets to be produced by Seattle Foundry, appellant, at the time of this telephone inquiry, had completed all of its arrangements with Seattle Foundry to produce billets for its purchase order with the New Zealand Government (R. 145). On May 15th or 16th Mr. Gips called Mr. W. W. Clark of appellee's San Francisco office and inquired as to whether appellee had an office in Seattle and could inspect billets produced by Seattle Foundry to be shipped to New Zealand (R. 464). Mr. Gips advised Mr. Clark that appellant had ordered 800 steel billets to be produced by Seattle Foundry under specification ASTM A-17/29. In a subsequent conversation with Mr. Gips a short time later, Mr. Clark advised Gips that the Seattle Foundry

had no facilities for rolling or forging billets as called for by ASTM A-17/29 (R. 76, 77, 465, 466, Ex. A-1, Appendix 42). Mr. Gips, at the time of this telephone conversation, had before him Schlauch's letter of May 8th (Ex. 9, Appendix 39) stating that the billets produced by Seattle Foundry would be "cast steel from sand molds" (R. 207, 212). In any event, in a telephone conversation on either May 15th or 16th, 1952, Mr. Clark orally agreed that appellee would inspect the product which was to be produced by Seattle Foundry (R. 143). Although the appellee was advised that the billets were for shipment to New Zealand, the appellee was not advised that the New Zealand Government intended to use the billets for railroad locomotive parts until after the claim arose (R. 92, 399, 474). At this time appellee had no knowledge of either the contents of the New Zealand Government's purchase order or of appellant's purported written contract with Seattle Foundry (R. 399, 407, 474, 479). At this time each of the parties assumed that the billets to be produced by Seattle Foundry and to be inspected by appellee were cast steel billets (R. 76, 95).

Mr. Clark made pencilled notes of his telephone conversation with Gips on May 16th (R. 467, Ex. A-1, Appendix 42). After discussing his conversation with Mr. Gips with his superior, Mr. Parker M. Robinson, manager of appellee's San Francisco office, Clark called appellee's Seattle office on May 16th to inform them of the pending inspection job (R. 468). Thereafter, on May 17th, Clark wrote appellee's Seattle office advising of appellant's order to appellee to inspect cast steel billets and set forth in detail the method of sampling

and inspection to be followed by the appellee's Seattle office (R. 468, 469, Ex. A-3).

On May 20, 1952, Mr. Gips wrote appellee's San Francisco office confirming the oral agreement to inspect the billets ordered by appellant from Seattle Foundry (Ex. 21, Appendix A to Appellant's Brief). Upon receipt of this letter, appellee's San Francisco office replied and agreed to inspect the billets (Ex. 22, Appendix B to Appellant's Brief).

Production of the billets was commenced by Seattle Foundry in early June and completed September 3, 1952. Periodically during the course of the inspection of the billets produced by Seattle Foundry, appellee furnished appellant 43 reports of its inspection (Ex. 35, A-31). In practically all of these reports, appellee advised appellant that it had observed and inspected the "casting" of the billets produced by Seattle Foundry. At no time during the production of the billets or upon receipt of the reports from appellee did appellant question the reports or the use of the terms "cast" or "casting" therein. While appellee's reports of its inspection were furnished to appellant's San Francisco office, appellant admittedly did not read all of these reports and Mr. Gips testified, "it doesn't make much sense to me" (R. 221). Although in its purported contract of May 16th with Foundry (Ex. 20, Appendix C to Appellant's Brief), appellant requested Seattle Foundry to furnish plant certificates certifying that the billets met the specifications ASTM A-17/29, Seattle Foundry did not furnish said plant certificates (R. 300).

On May 15, 1953, the New Zealand Government wrote appellant advising them that the steel billets supplied did not meet the specifications of ASTM A-17/29 in that they were of cast steel rather than rolled or forged (Ex. 42). Thereafter, appellant voluntarily refunded the New Zealand Government $21,747.24 of the total price of $37,462.64 paid by New Zealand for the billets (R. 100). This suit was instituted by appellant against appellee to recover the amount so refunded by appellant to New Zealand.

After having heard the testimony and the evidence on the merits, the trial court awarded judgment in favor of the appellant against the appellee in the sum of $3,151.84, being the amount which appellant paid appellee for its inspection services. The trial court concluded that the exchange of letters between appellant and appellee dated May 20 and 21, 1952 (Exs. 21, 22) constituted a written integrated contract. The trial court concluded that appellee breached the contract by failing to inspect billets in compliance with the specifications set forth in the written contract and in failing to give a certification as required by the terms of the contract (R. 96). The court found that the agreement between appellant and appellee called for the inspection of billets that were ordered from and to be produced by Seattle Foundry (R. 54, 55); that the employees of appellant who handled the transactions with appellee and Seattle Foundry had information and knowledge that the billets to be produced by Seattle Foundry were "cast steel from sand molds" and "cast steel billets" (R. 95). In its written decision, the court pointed out that the inspection services of appellee

were sought by Gips after appellant had decided to purchase the billets from Seattle Foundry; that the written contract between appellant and appellee was negotiated following the contract between appellant and Seattle Foundry (R. 65). The trial court found as a fact that the services of appellee were not sought to guide or advise appellant in placing their order or awarding their contract for the purchase of the billets (R. 65, 66).

As to the measure of damages, the court found that the damages of $21,747.24 sought by appellant (apart from the compensation paid appellee of $3,151.86) were the natural and proximate consequences of the breach of contract by *Seattle Foundry,* if such contract called for forged or rolled billets rather than cast steel billets, or in the event said contract did not so provide, the natural and proximate consequences of *appellant's* own *failure* to purchase billets that did meet the specifications of their contract with New Zealand (R. 66). The court held that the only damages suffered by appellant as a direct and proximate result of appellee's breach of its contract with appellant was the sum of $3,151.86; and that such damages were the only damages which were within the contemplation of the parties at the time the contract was entered into as a likely consequence of the nonperformance of appellee's contract to inspect billets produced by Seattle Foundry (R. 101). Judgment was entered in favor of appellant against appellee September 21, 1956, in the sum of $3,151.86 together with interest thereon at the rate of 6% per annum from August 26, 1954 (R. 103-105). The appellant now appeals from this judgment contending

that the trial court erred in admitting and considering certain evidence in determination of appellant's damages and that the court committed error in not awarding appellant the sum of $21,747.24 in damages against the appellee.

SUMMARY OF ARGUMENT

The trial court found that the only damages suffered by appellant which were caused by appellee's breach of contract were the sum of $3,151.86 being the amount paid by appellant to appellee. Appellant attacks the trial court's finding claiming that appellee's breach caused appellant to suffer damages in the sum of $21,747.24. We hereafter discuss under part I, appellant's argument and authorities. We then consider, under part II, that the alleged damages of $21,747.24 claimed by appellant were not proximately caused by appellee's failure to inspect the billets produced by Seattle Foundry. Under part III, we consider that appellant's alleged damages for failure to supply rolled or forged billets to New Zealand were not within the contemplation of both parties at the time when the contract for appellee's services was made. Accordingly, the judgment of the trial court should be affirmed.

ARGUMENT

I.

APPELLANT'S ARGUMENT AND AUTHORITIES

While appellant sets forth six specifications of error on pages 10 to 12, inclusive, of its brief, these may be conveniently grouped in three categories as follows: (1) error in admitting and considering certain evidence as to what damages were within the contemplation of

the parties; (2) error in finding that appellee's inspection services were not sought by appellant prior to the time appellant entered into a formal contract with Seattle Foundry; and (3) error in finding that the only damage suffered by appellant as a direct and proximate consequence of the breach by appellee of its contract with appellant was the sum of $3,151.86.

Before discussing appellant's argument and authorities, it is appropriate to point out the weight which must be given to the trial court's findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure governs this point, stating in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *United States v. Yellow Cab Co.*, (1949) 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150, the Supreme Court discussed the "clearly erroneous" doctrine of Rule 52(a) at page 342, as follows:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "

To the same effect see: *United States v. United States Gypsum Co.,* (1948) 333 U.S. 364, 68 S.Ct. 525, 92 L.ed. 746, and *West v. Conrad,* (C.C.A. 9, 1950) 182 F.(2d) 255.

In the present case, the trial court, in addition to making detailed Findings of Fact (R. 81-101, inclusive) also incorporated in his findings "any additional facts found by the court in its written memorandum decision . . . to supplement the findings of fact" (Finding of Fact XXIII, R. 101). Accordingly, the doctrine of Rule 52(a) applies equally to facts found in the memorandum decision (R. 42-80).

Evidence as to Contemplation of Parties Admissible on Issue of Damages

Appellant contends that the trial court erred in admitting and considering certain evidence in determining the amount of appellant's damages, if any, caused by appellee. Specifically, it is urged on page 18 of appellant's brief that the court erred in admitting evidence of appellee's understanding that the billets ordered and to be produced were *cast* steel billets instead of billets that had been subsequently rolled or forged. In support of this Specification of Error appellant cites cases and authorities with respect to the parol evidence rule which, of course, applies only to the formation of a contract, not to evidence admitted in connection with damages.

The Washington cases cited by appellant in support of this rule of limited application are *Asbury v. Yakima Milling Co.,* (1926) 137 Wash. 203, 242 Pac. 362; *Shannon v. Prall,* (1921) 115 Wash. 106, 196 Pac. 635; and *Hopkins v. Barlin,* (1948) 31 Wn.(2d) 260, 196 P.(2d) 347. None of these cases deal in any way with the admission or exclusion of parol or extrinsic evidence introduced for the purpose of assessing or determining

the amount of damages sustained by plaintiff as a natural consequence of a breach of contract by defendant. None of the cited cases present the question as to what type of relevant evidence is admissible upon this issue. In such case, all relevant evidence bearing upon this issue is admissible, written, oral or otherwise, and such relevant evidence does not fall within the ban of the so-called parol evidence rule because it is not admitted, for the purpose of varying or contradicting the terms of an integrated contract; rather, it is admitted for the purpose of determining the amount of damages, if any, sustained by one party by reason of a breach of such integrated contract by the other party. The evidence is not "parol evidence" as such term is used in connection with the parol evidence rule. In short, the parol evidence rule is a rule of limited application; it does not serve to exclude evidence, oral or otherwise, relevant to the issue of recoverable damages.

The trial court held that appellant and appellee had a written integrated contract consisting of an exchange of letters dated May 20 and May 21, 1952 (R. 88, Exs. 21 and 22). The court also found that this contract required appellee to inspect steel billets to be produced by Seattle Foundry in compliance with specifications ASTM A-17/29 and to give appellant its certification with respect to such inspection (R. 61, 62). Appellant's objection to the admission and consideration of testimony to the effect that appellee understood that such billets were to be *cast* steel billets appears to be based upon the premise that such understanding was that of Mr. Clark, appellee's agent, alone. In fact, this understanding was *mutually* shared by both Mr. Clark and

appellant's agent, Mr. Gips, and the court so found (R. 75, 76, 77, 95). Since this was evidence relevant to the issue of what damages could reasonably have been anticipated by or were within the contemplation of both parties at the time of the contract, it did not fall within the ban of the parol evidence rule. In passing on this point, the lower court stated in its written memorandum decision (R. 76) as follows:

> "This evidence, while inadmissible to vary the terms of the written contract, is admissible and relevant to the issue of what was within the contemplation of the parties, with respect to the special damages now being claimed, at the time the contract was entered into. *Globe Refining Co. v. Landa Cotton Oil Co., supra; Messmore v. New York Shot & Lead Co.,* 40 N.Y. 422; Sutherland on Damages (4th ed.) Sec. 51."

Section 51 of 1 Sutherland, *Damages,* cited by the trial court (discussing *Messmore v. New York Shot & Lead Co.,* 40 N.Y. 422) states as follows:

> "The contract between these parties was in writing but did not contain any allusion to the special object of making it. It was held, notwithstanding, that it was competent to prove such antecedent contract and parol proof was admissible to establish that the defendant was informed that the plaintiff made the contract in question with a view to performing the other.; . . ."

To the same effect, see: McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract,* 19 Minn. L. Rev. 497, 507.

The admission and consideration by the trial court of evidence as to what was within the contemplation of the parties at the time the contract was entered into is fur-

ther supported by two early and oft cited Massachusetts cases. In *Weston v. Boston & Maine R. R. Co.,* (1906) 190 Mass. 298, 76 N.E. 1050, the court dealt with this question as follows, at page 1051:

> "But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making the contract. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question as to what damages were in contemplation of the parties to it, *whether a party seeks to recover ordinary or special damages.* That has been laid down in all the cases on the subject." (Emphasis supplied)

Several years later the Massachusetts court again had occasion to pass on this question in *Hanson & Parker v. Wittenburg,* (1910) 205 Mass. 319, 328, 91 N.E. 383, with the following results, at page 384, 385:

> "But as damages are assessed as compensation, the amount awarded should be such as the parties at the time of the making of the contract are supposed to have contemplated naturally would follow from the probable consequences of a breach (citing cases). And may be proved by parol evidence, even if the contract is in writing."

See also: *Globe Refining Co. v. Landa Cotton Oil Co.,* (1903) 190 U.S. 540, 544, 23 S.Ct. 754, 47 L.ed. 1171.

Not only has appellant exhibited a complete lack of understanding of the parol evidence rule, but, in addition, it has made the erroneous assumption (page 22, Appellant's Brief) that although extrinsic evidence of special circumstances is always admissible to en-

large plaintiff's recovery it is never admissible in reduction of the same!

The trial court committed no error in admitting and considering evidence of what was within the contemplation of *both* parties at the time of contracting in its determination of the damages to be assessed in the instant case.

The trial court, by its decision, gave full effect to the terms of the written contract between the parties. Appellant's argument to the contrary must fail, because, as will be demonstrated, appellant's loss resulting from its failure to deliver billets conforming to ASTM A-17/29 specifications to the New Zealand Government was not a natural consequence of and was not caused by appellee's failure to inspect billets in accordance with the terms of its contract with appellant; rather, as the court found, such loss was the natural consequence of and was caused by Seattle Foundry's failure to produce conforming billets and deliver the same to appellant, or appellant's failure to order conforming billets from Seattle Foundry in the first instance.

When Appellee's Inspection Services Were Sought by Appellant

Appellee will concede for the purposes of argument that the testimony of Mr. Gips set out on page 24 of Appellant's Brief indicates that he had some telephone conversation with Mr. Clark of appellee's San Francisco office prior to the time that appellant actually employed Seattle Foundry to produce the billets in question. However, it should be noted that this testimony also establishes that at the time of these conver-

sations, appellant had decided that the billets would be produced by Seattle Foundry and that an order therefor would be placed with Seattle Foundry in the near future. In this connection, Mr. Gips testified as follows:

> "The first contact I had with Pittsburgh Testing Laboratory was by 'phone and I talked to Mr. Clark and I informed him that we *had obtained* steel billets and that his company had been recommended to me to make inspection for quality of the product to be delivered and that we *had intention of*—we were considering placing this order with Seattle Foundry Company in Seattle." (R. 145) (Emphasis supplied)

Apparently appellant considers it extremely important to establish that appellant contacted appellee before actually placing the order with Seattle Foundry. In this connection it is interesting to note that Mr. Gips, appellant's agent, testified that his verbal understanding with appellee was reached sometime between Monday, May 12, 1952, and Thursday, May 15, 1952, and concerned an inspection of billets *to be produced by Seattle Foundry* (R. 143, Appellant's Brief 24 and 25). If the verbal understanding was to inspect billets to be produced by Seattle Foundry, as distinguished from billets to be produced by *any* supplier with whom appellant might place an order, it necessarily follows that appellant had, prior to such verbal understanding, decided to place the order for billets with Seattle Foundry. In this connection, the trial court made the following finding in its memorandum decision (R. 65, 88):

> "The inspection services of Pittsburgh were sought by Gips after Grace *had decided to purchase* the billets from Foundry. The Grace-Pitts-

burgh written contract was negotiated following the contract referred to above between Grace and Foundry." (Emphasis supplied)

In any event, this question of which came first, appellee or Seattle Foundry, is wholly immaterial. The important consideration as stated by the trial court in its memorandum decision and in its findings of fact is that " . . . *the services of Pittsburgh were not sought to guide or advise Grace in placing their order or in awarding their contract for the purchase of the billets involved*" (R. 65, 92). Appellant refers to this finding as being "wholly immaterial" (Appellant's Brief, p. 25). We suggest that this finding, which is uncontradicted and which the record amply supports, is determinative of the issues presented on this appeal. Appellant should not be allowed to recover damages from appellee which resulted from its own actions or from a breach of contract by Seattle Foundry. For recovery of these damages, appellant should have pursued its remedies against Seattle Foundry, not appellee.

Accordingly, it is unimportant that Gips *may* have had some preliminary discussion with appellee prior to making a formal contract with Seattle Foundry. It is equally unimportant to the disposition of this case for what purpose Mr. Gips, as a matter of hind sight, may have sought the inspection services of appellee. Appellee's only duty to appellant was to inspect steel billets to be produced by Seattle Foundry according to certain specifications; appellee did not intend to and did not in fact undertake to produce these billets, to supervise their production or to assure appellant that Seattle Foundry could or would produce the same (R. 66, 67).

Appellant's Cases and Authorities on Damages

The majority of the cases cited in support of appellant's Specifications of Error No. 4, No. 5 and No. 6 (Appellant's Brief, 28 to 37, incl.) present a factual pattern wherein the defendant has contracted to sell or supply plaintiff with specific goods or materials which plaintiff, in turn, has contracted to sell to a third person. Illustrative of these cases is *Dally v. Isaacson,* (1952) 40 Wn.(2d) 574, 245 P.(2d) 200 (subcontract to manufacture millwork for plaintiff for army contract); *Sedro Veneer Co. v. Kwapil* (1911) 62 Wash. 385, 113 Pac. 1100 (contract to furnish plaintiff with egg case lumber shooks for resale); and *Martinac v. Bakovic,* (1930) 158 Wash. 193, 290 Pac. 847 (contract to build and deliver fishing boat to plaintiff for specific purposes of fulfilling a fishing contract). These cases would be particularly appropriate to sustain a recovery of damages in an action by appellant against Seattle Foundry. However, they do not support any additional recovery by appellant against appellee. Appellee did not contract to sell or supply appellant with steel billets for delivery to New Zealand. Only Seattle Foundry occupies this position. Accordingly, if such contract to supply steel billets was breached, appellant must look to Seattle Foundry, not appellee, for recovery of the resulting damages.

The additional authorities cited by appellant to sustain its position against appellee, such as 1 Sutherland, *Damages,* (4th Ed.) Sec. 50, contain general rules of law relating to damages recoverable for breach of contract. These general rules are undoubtedly correct; however, appellee does not agree with appellant's ap-

plication of the same to the facts of the instant case. This for the reason that appellant's damages resulted from Seattle Foundry's failure to supply steel billets to appellant as per ASTM specifications, or, in the alternative, resulted from appellant's failure to order conforming billets from Seattle Foundry in the first instance. Appellant's damages did not result from appellee's failure to inspect the steel billets produced by Seattle Foundry according to specifications; accordingly, the general rules relating to damages cited by appellant are inapplicable to the present case. The fallacy in appellant's attempted application of these general rules to the present case is best illustrated by the rule of limitation thereon set forth in 1 Sutherland, *Damages,* (4th Ed.) Sec. 50, at page 187, following a quotation from *Hadley v. Baxendale,* (1854) 9 Exch. 341, 156 Eng. Rep. 145:

> "It is to be remembered that there is no relaxation of the rule confining the recovery to the damages *naturally* and *proximately* resulting from the breach in cases where there are such known special circumstances. *Indeed, the same strictness exists to confine the recovery to the immediate consequences.*" (Emphasis supplied)

Appellant seeks to satisfy the requirements imposed by this rule by stating that "appellant's loss arising out of the New Zealand order was proximately caused by appellee's breach, . . . " (Appellant's Brief, 28, 29) and that "The rule of *Hadley v. Baxendale* and the foregoing authorities make it clear appellant's damages arising out of the New Zealand order were proximately caused by appellee's breach of contract" (Appellant's Brief, 32). These statements are, of course, mere con-

clusions of the writer which, as will be hereafter demonstrated, are wholly erroneous.

II.

APPELLANT'S CLAIMED DAMAGE NOT CAUSED BY APPELLEE'S FAILURE TO INSPECT

A proper analysis of the proximate cause of appellant's damage must begin with a consideration of certain uncontroverted facts: that appellant's contract with New Zealand and appellant's contract with Seattle Foundry were negotiated by appellant alone without the aid or inducement of appellee (R. 65, 66, 92); that appellant knew that Seattle Foundry intended to supply appellant with *cast* steel billets in performance of this contract (Ex. 9, Appendix 39, R. 77, 95); that Seattle Foundry was equipped to cast steel only and had no facilities whereby it could forge or roll steel (R. 25); and that appellee understood that the billets to be produced by Seattle Foundry and inspected by it were to be *cast* steel billets (R. 76, Ex. A-1, Appendix 42).

Thus, prior to the time that appellant engaged the inspection services of appellee, appellant had either (a) contracted to purchase steel billets according to specifications ASTM A-17/29 from a supplier which was incapable of producing the same, or (b) contracted to purchase *cast* steel billets from such supplier, which billets would not conform to the specifications contained in appellant's contract with New Zealand. In either case, appellant itself had provided a basis for its resulting damage, through no fault of the appellee. Given this set of circumstances, it was impossible for appellant to subsequently avoid a loss arising out

of Seattle Foundry's incapacity or failure to supply appellant with steel billets that had been rolled or forged rather than cast steel billets; the failure of appellee to inspect and reject such billets did not contribute to the non-conforming character thereof.

With these facts in mind, it is suggested that the general rule of damages set forth in 1 Sutherland, *Damages,* (4th Ed.) Sec. 45, p. 170 is particularly apropos to disposition of this appeal:

> "In an action founded upon a contract *only such damages can be recovered as are the natural and proximate consequence of its breach;* . . . the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into." (Emphasis supplied)

This rule, of course, must be considered in conjunction with the following rule of limitation announced in the case of *Platts v. Arney,* (1957) 150 Wash. Dec. 33, 309 P.(2d) 372, at pages 374 and 375, as follows:

> "The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. *It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed.*[1] He is entitled to the benefit of his bargain, *i.e.* whatever net gain he would have made under the contract. (Citing cases)
>
> *"The plaintiff is not, however, entitled to more than he would have received had the contract been*

[1]The contract to which this rule applies is the contract between appellant and appellee not the contract between appellant and Seattle Foundry.

> *performed.* If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery." (Emphasis supplied)

Appellant is seeking to force appellee to restore appellant to the position that appellant would have been in had *Seattle Foundry* supplied billets to appellant conforming to the New Zealand specifications, not the position that appellant would have been in had appellee performed its contract with appellant. Performance by appellee would not, indeed could not, *assure* appellant that Seattle Foundry would produce steel billets conforming to contract specifications, for Seattle Foundry was incapable of such production. Appellee did neither induce nor contribute to this inability of Seattle Foundry; appellant by its own action agreed to purchase steel billets from a supplier that could not under any circumstances produce the same according to specifications ASTM A-17/29. If appellee had advised appellant that the *cast* steel billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29 and that only steel billets that had been rolled or forged would suffice, this information or performance by appellee, would not have assured appellant that Seattle Foundry would thereafter produce conforming billets; Seattle Foundry was incapable of producing the same. If appellant's contract with Seattle Foundry called for steel billets that had been rolled or forged (as distinguished from *cast* steel billets), Seattle Foundry's inability or failure to perform the same (through no fault of appel-

lee) would in the ordinary course of events make Seattle Foundry liable to appellant for breach of its contract to supply conforming billets and all consequential damages resulting therefrom, including any loss of profit on the New Zealand contract. In this connection, it is important to note that in such case, if appellant had purchased conforming billets from Isaacson Iron Works, the supplier upon whose original quotation appellant based its resale price to New Zealand, Isaacson's price for supplying such conforming billets to appellant would have been $36,310.00 (R. 337, 338) not $33,400.00 as asserted by appellant (Appellant's Brief, p. 35). Thus, appellant's profit on the resale to New Zealand could never have exceeded the difference between the appellant's price to New Zealand, $37,462.64, and Isaacson's price to appellant, $36,310.00, or $1,152.64.

If appellee had performed its contract to inspect steel billets to be produced by Seattle Foundry according to the specifications, appellant would still have lost the benefit of Seattle Foundry's performance and consequently appellant's anticipated profit upon the New Zealand contract in the sum of $7,192.60 (using Seattle Foundry's price), without any breach of contract by appellee. In such case Seattle Foundry would have been liable to appellant for all of the direct and consequential damages resulting from Seattle Foundry's failure to supply appellant with conforming billets, including appellant's loss of profit. The only way that appellant could have avoided such loss would have been to assert its claim against Seattle Foundry for breach of contract and thereafter realize upon the same.

If, on the other hand, appellant's contract with Seattle Foundry called for *cast* steel billets (as distinguished from billets that had been rolled or forged), then in that event Seattle Foundry furnished to appellant billets in accordance with the Seattle Foundry-appellant contract. In such case, if appellee had advised appellant that the cast steel billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29, and that only steel billets that had been rolled or forged would suffice, appellant, if it had rejected the Seattle Foundry billets, would have been liable to Seattle Foundry for breach of contract and consequential damages. In addition, appellant would have lost the benefit of the Seattle Foundry contract and, in order to perform the New Zealand contract, would have been forced to purchase steel billets with specifications ASTM A-17/29 from Isaacson Iron Works for $36,310.00.

Appellee did not warrant or guarantee to appellant Seattle Foundry's performance of its contract with appellant, and therefore is not responsible for damages sustained by appellant because of Foundry's failure to supply appellant with billets in accordance with specifications ASTM A-17/29. *Gagne v. Bertran,* (1954) 43 Cal.(2d) 481, 275 P.(2d) 15, 20.

As has been demonstrated, appellant would have suffered the loss of Seattle Foundry's performance and, in addition, its profit on the New Zealand contract even if appellee had advised appellant that the *cast* steel billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29. As found by the lower court (R. 79, 80):

> "... that, except for the item of compensation paid Pittsburgh for services, the damages claimed by Grace were not the direct and proximate consequence of the breach of contract by Pittsburgh nor within the contemplation of both parties at the time the contract was entered into as a likely consequence of its nonperformance. Grace is not entitled to such damages as claimed for the reasons already set forth."

As has been demonstrated, even if appellee had advised appellant that the billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29, the only way that appellant could have avoided the loss which it has suffered would have been to prosecute its claim, if any, against Seattle Foundry for breach of contract and recover consequential damages. The failure of appellee to so advise appellant of the non-conforming character of the billets did not render Seattle Foundry *any less liable* to appellant for breach of contract, if any there was. Consequently, appellant's loss was caused not by appellee's failure to act; rather it was caused (1) by Seattle Foundry's breach of contract, or, (2) if Seattle Foundry did not breach its contract with appellant, by appellant itself when it ordered *cast* steel billets from Seattle Foundry.

The principle governing a situation such as this was applied in the case of *Young v. Yeates,* (1922) 153 Minn. 366, 190 N.W. 791, wherein plaintiff sued its rental agents for loss of rentals sustained by plaintiff as a result of a breach of lease by one of plaintiff's tenants. The court held (pp. 792, 793) that although defendants may have violated their contractual duty to

plaintiff, plaintiff suffered no loss as a result thereof and could not recover from the defendants rentals due and owing by the tenant. Similarly, appellant may not recover damages from appellee which are properly chargeable to Seattle Foundry.

Again, in the case of *First Nat. Bank of Mandan v. Larsson,* (1937) 67 N.D. 243, 271 N.W. 289, wherein a collecting bank applied payments received by it to an indebtedness owing to it and not upon a note which it held for collection for its principal, it was held that notwithstanding this breach of duty the principal could not recover the amount of the note from the bank, because the principal had sustained no damage as a result of such breach of duty.

This court has also had occasion to hold that damages, to be recoverable, must have been proximately caused by the breach of contract complained of. *Goddard v. Metropolitan Trust Co. of California,* (C.C.A. 9, 1936) 82 F.(2d) 902. In that case, plaintiff sued the defendant bank for the latter's failure to obtain a proper trust mortgage as security for a loan made by plaintiff to one Dingwell. The lower court sustained a demurrer to plaintiff's complaint and plaintiff appealed from a judgment of dismissal. Thereupon, this court affirmed the judgment of dismissal, stating at pages 904, 905:

> "Plaintiff in this case claims as damages the entire amount of his loan to Dingwell, which amount, he alleges, has been wholly lost, but, as previously indicated, the complaint fails to show that this loss was the proximate result of defendant's violation of plaintiff's instructions. The

causal connection, if any, between the violation and the loss is not shown. *The complaint does not allege, nor does it state any fact from which it may be inferred, that compliance with plaintiff's instructions would have prevented the loss complained of.*" (Emphasis supplied)

So, in the instant case, performance by appellee of its contract with appellant would not have prevented the loss of which appellant complains.

Accordingly, the following Finding of Fact made by the lower court upon this issue was properly made and should be affirmed on this appeal (R. 101):

> "The only damages suffered by Grace as a direct and proximate result of Pittsburgh's breach of its contract with Grace was the sum of $3,151.86, to-wit, the sum paid by Grace for Pittsburgh's said inspection services; that such damages were the only damages which were within the contemplation of both parties at the time said contract was entered into as likely consequence of the non-performance of Pittsburgh's contract to inspect billets produced by Foundry."

III.

APPELLANT'S ALLEGED DAMAGE FOR FAILURE TO SUPPLY ROLLED OR FORGED BILLETS TO NEW ZEALAND WAS NOT WITHIN THE CONTEMPLATION OF BOTH THE PARTIES WHEN INSPECTION CONTRACT MADE

The trial court found that the damages of $21,747.24 claimed by appellant were not "within the contemplation of both the parties at the time the contract was entered into as a likely consequence of its (appellee's)

nonperformance'' (R. 79, 80). A review of the evidence adduced at the trial will make it readily apparent that the trial court was correct in so finding.

The record shows that appellant knew as early as the last week in April, 1952, or the first two days of May, 1952, that Seattle Foundry would produce cast steel billets. Mr. Murphy of Seattle Foundry so advised Mr. Schlauch of appellant's Seattle office (R. 274, 275, Ex. 54, p. 55). Again, on May 5th, Murphy told Schlauch the billets produced by Seattle Foundry would be ''cast steel billets from sand molds'' (R. 276, 277). It was during this telephone conversation with Murphy that Schlauch made a pencilled note ''cast steel from sand molds'' on Exhibit 7 (R. 279). Much later, when Schlauch realized the significance of this notation (and after the claim of the New Zealand Government arose), Schlauch attempted to erase his little quotation from Murphy. But the pencilled note is still legible on Exhibit 7 and serves to point up further that appellant knew from its earliest dealings that Seattle Foundry was offering to produce cast steel billets for the appellant.

This is further corroborated by Mr. Schlauch's letter to Gips dated May 8, 1952, discussing Seattle Foundry's offer in which Schlauch stated, ''These billets are cast steel from sand molds . . .'' (Ex. 9, Appendix 39). On May 16th Murphy warned appellant that he was furnishing cast steel billets when he stated, ''It is our intention to pour these billets in sand molds'' (Ex. 23, Appendix 40). In the light of these undisputed facts, can there be any doubt that the trial court prop-

erly found that appellant knew billets produced by Seattle Foundry would be "cast steel billets"? (R. 95)

In addition, there were other warning signals which should have caused appellant to wonder if it had ordered a product from Seattle Foundry which would fill its New Zealand purchase order. Isaacson Iron Works, who had been recommended to Gips as a supplier by Mr. Gleason, his friend at Kaiser Steel Company (R. 119), had offered to supply 750 billets for $156.50 per net ton and 50 billets for $177.50 per net ton (R. 271, Ex. 6). Based on these Isaacson prices, appellant added freight charges and a normal profit of about 5% and submitted appellant's bid to the New Zealand Government (which was accepted) to sell New Zealand billets for $168.35 per net ton (750 billets) and $190.61 per net ton (50 billets) (R. 120, 187, 188, Ex. 8). Thereafter, Seattle Foundry offered to supply the 750 billets for $120 per net ton and the 50 billets at $130 per net ton (Ex. 14). While Seattle Foundry's offer was accepted by the appellant, appellant made no effort to reduce its prices on its resale contract to New Zealand. Accordingly, there was an unusually large differential in the prices of the two suppliers with whom appellant dealt (R. 192). In fact, Mr. Gips testified he had never seen such a large price variation in steel products (R. 193).

Had Seattle Foundry been able to produce steel billets to conform to ASTM A-17/29, Grace would have received a handsome profit. Mr. Schlauch expressed this hope in his letter to Mr. Gips of May 19, 1952 (Ex. 24). On the other hand, Seattle Foundry did not have

the facilities to roll or forge steel billets; hence, it could not have produced steel billets conforming to ASTM A-17/29 (Admitted Fact 18, R. 25). This, of course, made it apparent why Seattle Foundry's price was ridiculously lower than Isaacson's price.

With the foregoing warnings in mind, appellant either knew or should have known that the billets to be produced by Seattle Foundry would not comply with appellant's contract with New Zealand. In appellant's reckless attempt to receive this extraordinary profit without the attendant risk, appellant conceived the idea, in effect, of *insuring* the risk by obtaining appellee's inspection services of Seattle Foundry's product. In effect, appellant sought to insure its unusually high profit. To accomplish its end, appellant not only did not inform appellee of all of the facts, it actually withheld from appellee (according to the testimony of Clark and Robinson) the following essential information regarding the billet transaction: (1) the unusually large price differential between the offers of Isaacson and Seattle Foundry; (2) the details of appellant's purported written contract of May 16, 1952 (Ex. 20, Appendix C to Appellant's Brief); (3) Seattle Foundry's repeated statements to Schlauch that it would furnish "cast steel billets"; (4) the details of appellant's purchase order with New Zealand Government; and (5) the intended end use of the billets by New Zealand for railroad locomotive motion parts and coupler heads.

In spite of these facts and the non-disclosure, appellant in the present case seeks to hold appellee liable for

the claimed damage of $21,747.24 which appellant refunded to New Zealand. In short, appellant, having either ordered the wrong product from Seattle Foundry, or having ordered a product which Seattle Foundry could not produce, misled appellee by its non-disclosure and now seeks refuge by a strict interpretation of the exchange of letters of May 20 and 21, 1952 (Exs. 21 and 22).

After hearing all the witnesses and considering all the evidence, the trial court refused to hold appellee liable to appellant for the $21,747.24. As one of the grounds of its decision the lower court found that, under all the facts and circumstances at the time the contract was entered into as disclosed by all the evidence in the case, the damages claimed by appellant were not within the contemplation of both parties at the time the contract was entered into as a likely consequence of appellee's nonperformance (R. 79, 80, 101). The court further found that the only damages which appellant suffered as a direct and proximate result of appellee's breach of its contract with appellant was the sum of $3,151.86 paid by appellant to appellee (Finding of Fact XXI, R. 101).

The trial court was convinced that *both* appellant and appellee knew at the time the inspection contract was made that the billets to be produced by Seattle Foundry would be cast steel billets (R. 76, 77). It is undisputed that *cast* steel billets would not comply with the ASTM A-17/29 specifications, because such billets had not been rolled or forged. In discussing the knowledge of both parties that Seattle Foundry would produce cast

steel billets, the trial court accepted Mr. Clark's testimony rather than that of Mr. Gips, appellant's witness (R. 77).

In support of his conclusion as to the measure of damages, the trial court relied upon the rule of *Hadley v. Baxendale,* (1854) 9 Exch. 341, 156 Eng. Reprint 145, as enunciated in 1 Sutherland, *Damages,* (4th Ed.) Secs. 45, 50, and *Globe Refining Co. v. Landa Cotton Oil Co.,* (1903) 190 U.S. 540, 23 S.Ct. 754, 47 L.ed. 1171 (R. 69-75 inclusive). The trial court was convinced that the damages resulting to appellant from the delivery of cast steel billets instead of rolled or forged billets under its contract with New Zealand were (1) not the natural and probable consequence of appellee's breach, nor (2) in the contemplation of both parties when their contract was entered into as likely to result from its nonperformance.

The rule of *Hadley v. Baxendale, supra,* is recognized by all of the principal authorities in the field of contract damages. See: McCormick, *Damages,* (1935) p. 566. The American Law Institute, *Restatement, Contracts,* (1932) Sec. 330, sets forth the rule in these terms:

> "In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract is made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendants to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and foresee the injury."

As applied to the present case, the claim of $21,747.24 by the New Zealand Government against appellant was not an injury "following in the usual course of events," from the nonperformance by appellee of its inspection contract. Appellee was to inspect the product produced by Seattle Foundry. Appellant made its own contracts with both Seattle Foundry and New Zealand without reliance upon appellee. Seattle Foundry, not appellee, was employed to manufacture and deliver the billets to appellant.

Likewise, appellee had no reason to foresee the claim of New Zealand against appellant for failure of the billets to be rolled or forged. Appellee was instructed to inspect the billets produced by Seattle Foundry. Although appellee advised appellant that such billets would be cast steel billets, appellant already knew that from its negotiations with Mr. Murphy of Seattle Foundry. If this be the case, how can appellee be held to have foreseen that the New Zealand Government would complain about cast steel billets? This is particularly true, because appellee did not know the terms of either of appellant's contracts with Seattle Foundry or New Zealand. Appellee was never given this information.

The explanation and effect of the rule of *Hadley v. Baxendale, supra,* is most succinctly stated in McCormick, *Damages,* (1935) pp. 564-565, as follows:

> "The significance of the case lies not in the dictum that if notice is given liability *will* attach, for, as we have seen, unlimited liability had previously been the general standard. The history making influence of the case lies in the decision

> that liability will *not* attach for damage which was not 'in the contemplation' of the parties *'at the time they made the contract.'* It lays down a general standard of foreseeability of damage as at the time of the bargain, by which judges can prevent or overturn the allowance by juries of claims which would saddle on the defendant losses thought by the judges to be unjust or disproportionate."

In discussing the almost universal acceptance of the rule of *Hadley v. Baxendale, supra,* by the American courts, McCormick, *Damages,* (1935) pp. 567-568, observes as follows:

> "There has been but little variation of the original phraseology in the use of the principle by American courts, whose opinions still repeat the formula that damages are limited to the 'natural and probable consequences' and those in which in the light of the facts of which they had knowledge, were 'in the contemplation of the parties.' The same idea is occasionally expressed more simply and directly by stating that damages may be given only for those consequences of the breach which were 'reasonably foreseeable at the time the contract was entered into as probable if the contract was broken'."

In conclusion, therefore, there are ample grounds to sustain the trial court's finding that appellant's claimed damage was not in the contemplation of the parties at the time when they made their contract.

CONCLUSION

As found by the trial court, the alleged damages of $21,747.24 claimed by appellant were not the direct and probable result of the acts or omissions of appellee, nor were said damages within the contemplation of both parties at the time their contract was entered into as a likely consequence of appellee's nonperformance of its contract to inspect the billets produced by Seattle Foundry. Accordingly, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

GRAHAM, GREEN & DUNN
BEN J. GANTT, JR.
FRANK T. ROSENQUIST
Attorneys for Appellee
Pittsburgh Testing Laboratory.

APPENDIX

EXHIBIT 9

EXPORT DEPARTMENT

W. R. GRACE & Co.
408 White Bldg.
Seattle, U.S.A.
VIA AIR MAIL

SAN FRANCISCO #3234 5/8/52 #27

STEEL BILLETS

Our 3208.

Seattle Foundry offer for reply May 30th the following:

"A. Item No. 1 9½"x4"x4'½" Billets 750 off ASTM A-17/29 Type A Grade 2 or nearest equivalent Price quoted $120.00 per net ton.

"B. Item No. 2 6"x3"x10' Billets 50 off ASTM A-17/29 Type A Grade 1 or nearest equivalent Price quoted $175.00 per net ton.

"All prices F.O.B., Seattle Foundry Company, Seattle, Wn.

"Note: We could not make Item No. 2 unless proper priorities are released to obtain the nickel."

To these prices add $3.00 per 2000# for FAS Seattle. Suppliers can ship within 60/90 days after receipt of order.

These billets are cast-steel from sand molds and Item 1 will weigh approximately 515# each, and Item 2, 604# each.

Yours very truly,
W. R. GRACE & Co.
s/ W. H. Schlauch
W. H. Schlauch
Export Department

WHS:EB

EXHIBIT 23

May 16, 1952

W. R. Grace & Co.
408 White Bldg.
Seattle, Washington

Attention Mr. W. H. Schlauch
Export Department

Gentlemen:

We have just been informed of receiving the steel billet job as quoted in our letter of May 13, 1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4″ sides of Item No. 1 and the 3″ sides of Item No. 2.

The steel is to be ASTM A-17/29. This is a ASTM specification put out in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

ASTM A-17/29 Type A Grade 2		
Carbon	.15	.25
Manganese	.50	.80
Phos. max.	.045	
Sulphur max.	.05	
Grade 1		
Carbon	.05	.15
Manganese	.50	.80
Phos. max.	.045	
Sulphur max.	.05	

No other requirements were listed physical or chemical.

Will you kindly verify the above.

Yours very truly,
Seattle Foundry Company, Inc.

JWM:as James W. Murphy

EXHIBIT 24

EXPORT DEPARTMENT

W. R. GRACE & Co.
408 White Bldg.
Seattle, U.S.A.
VIA AIR MAIL
SAN FRANCISCO #3270 5/19/52 #27

PURCHASE ORDER #8881
STEEL BILLETS

We attach copy of letter received from Seattle Foundry regarding the above order, to which we would appreciate receiving your prompt reply in order that they may start manufacturing these Billets.

Seattle Foundry contacted Pittsburgh Testing Laboratory, Seattle, who did not have a copy of ASTM A-17/29. We would also like to have you confirm that this specification has the composition listed in Seattle Foundry Co.'s letter.

We return signed copy of the above Purchase Order, from which you will note the Billets will not be packed for export shipment but will be shipped loose, also the inspection by Pittsburgh Testing Laboratory will be for our account. Seattle Foundry will also issue their plant certificate.

We assume you sold these Billets basis the prices quoted by Isaacson Iron Works per our #3208, or close to them. We later gave you much lower prices from Seattle Foundry, therefore you should have a handsome margin in this business. Under the circumstances we believe we should participate in a substantial share of the profit instead of the usual 1% buying commission, and would like to have your confirmation.

Yours very truly,
W. R. GRACE & Co.
s/ W. H. Schlauch
W. H. Schlauch
Export Department

WHS:EB
Encl.

EXHIBIT A-1

Seattle Office S.F. # 5799

Order from W. R. Grace & Co.
2 Pine St. S.F.
Mr. Gips

200 tons cast steel Billets approximately divided
750 Billets 9½″x4″x4′-0½″
A-17-29 Type A Grade 2
50 Billets 6″x3″x10′0
A-17-29 Type A Grade 1

Sample each heat (ladle sample is best) for analysis and send drillings to us about 1½ oz.

Inspect for visual defects that cannot be chipped out easily

Watch Grade 2 for internal pin holes on Sand Cast Billets

Steel going to New Zealand Gov. Trade Commission

Price 4.00 hour for inspections and sampling
$10.00 a sample for C, Mn, P. S & Si
Shipment in 60 to 90 days

Contact Foundry and be prepared to obtain samples and inspect billets